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No. 92-210

In The

Supreme Court of the United States

October Term, 1992

CLARENCE DUPNIK, the Sheriff of Pima County, Arizona; THOMAS TAYLOR; WEAVER J. BARKMAN; PETER RONSTADT, Chief of Police, Tucson, Arizona, and KAREN WRIGHT,

Petitioners,

v.

MICHAEL COOPER and LIDIA COOPER, husband and wife, in their own capacity and as parents of ABRAM COOPER and ADAM COOPER, minors,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed May 5, 1992.

FACTS

Plaintiff's presentation of the facts in this case is so fundamentally exaggerated that further comment is required.

First, plaintiff characterizes the interrogation plan as sinister because it had a purpose to "wear down the suspect and induce a confession." Assuming that the very term "interrogation" implies something more than an abstract inquiry of a suspect whether he feels like making a confession at that time, every interrogation is likely to have a purpose to overcome a suspect's natural instinct not to admit guilt to the police. Although plaintiff, in the procedural setting of this appeal, is entitled to the benefit of favorable inferences of fact, there must be some sort of limit to those inferences when the product is purely vituperative on the one hand and contains material omissions of undisputed fact on the other. The failure to acknowledge that Mr. Cooper *wanted* to provide the investigators with information can hardly be an innocent oversight on the part of plaintiff's attorneys. An excerpt from Mr. Cooper's deposition makes this an uncontrovertible fact. (See Exhibit C to this brief.) Plaintiff's attorneys nevertheless persist in assertions that the investigators forced plaintiff to speak when he did not want to do so. Nothing is further from the truth.

The police had compelling evidence to believe that Cooper was guilty.[1] Experience and common sense teach

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[1] While the fingerprint information was erroneous, it was not the error of any of these petitioners. In fact the district court has granted summary judgment in *their* favor on any claims addressing the mistaken identification.

that suspects frequently deny guilt, even when they are in fact guilty. The interrogator's art is to accomplish the obtaining of an admission or confession by overcoming the suspect's natural resistance to telling the police he is guilty, and to do this by constitutionally sound methods. What plaintiff complains of here is implicit in any interrogation; the sensational characterization given to it is neither accurate nor justified.

The characterization of the interrogator's purposes "to prevent the suspect from testifying at his own trial" and "to deprive the suspect of an opportunity of forming an insanity defense" are more of the same intemperate melodramatics. These investigators had justifiable reasons to believe in plaintiff's guilt. Their efforts to obtain a confession from him were based on this belief. The presence of a confession would have provided compelling impeachment evidence. Perhaps, even enough to "keep him off the stand," but the same would be true of any strong impeachment evidence.

Similarly, any discussion with plaintiff which showed a functioning intellect and lack of any sign of mental illness would make a claim of insanity more difficult to prove. Such an effort is legitimate; persons of good will could hardly come to the conclusion that such a purpose was "to deprive the suspect of an opportunity of forming an insanity defense."

Another misstatement by omission occurs on p. 7 of plaintiffs' brief:

> " . . . Wright, in a passing manner asked Cooper if he had any problem talking to her. To which Cooper responded that he did. . . . "

In fact Wright reminded plaintiff of the advice of rights performed about an hour before and asked if Cooper had any problem in speaking with her, Cooper replied that he had a big problem because he was innocent. Wright then inquired whether Cooper objected to speaking with her and Cooper indicated no objection. (All of the foregoing exchange has been attached as Exhibit A to this brief; a tape recording of that excerpt has been lodged with the court.)

The purpose of providing this information was to allow the court to be aware that Cooper was reminded of the *Miranda* warnings given earlier and asked if he was willing to talk to her; he was. The characterization of this transaction contained in plaintiffs' brief is not justified.

ARGUMENT

1. Self-Incrimination Was Not Abridged

Plaintiff characterizes the circumstances of this case as unique, presumably based on the intentional decision to question after a request for counsel. This characterization is essential to defending the novel concept invented by the Ninth Circuit that this interrogation was actionable because it was not "benign," and that an intentional decision to question after a request for counsel which was "benign" would not be actionable.

No other circuit has ever held that to ignore an *Edwards*[2] request for counsel and to continue interrogation of an arrestee violates the constitution. Neither has

[2] *Edwards v. Arizona*, 451 U.S. 477 (1981).

this court. In fact deliberate continued questioning was assumed in this courts' decision in *Oregon v. Hass*, 420 U.S. 714 (1975), and the resulting statement was admissible in a criminal trial for impeachment.

More factually similar is *Warren v. City of Lincoln, Nebraska*, 864 F.2d 1436 (8th Cir. 1989). An *en banc* decision of the United States Court of Appeals for the Eighth Circuit held that deliberate custodial questioning after a request for counsel did not violate the constitution.

The requirements of the *Miranda*[3] decision are not constitutional in character. The opinion in *Miranda* so states, and no case in this court has ever departed from that idea. The *Miranda* requirements protect constitutional rights, but they are not, themselves, constitutional rights. *New York v. Quarles*, 467 U.S. 649 (1984). While the purpose of the *Miranda* requirements is to dispel the inherent coerciveness of a custodial interrogation, an interrogation without compliance with *Miranda* does not offend self-incrimination by itself. That privilege is not offended until statements are introduced in a criminal case against the arrestee, *United States v. Verdugo-Urquides*, 494 U.S. 259 (1990). Criminal trial use is the very essence (and literal wording) of the self-incrimination privilege; no use - no violation, *Kastigar v. United States*, 406 U.S. 441 (1972), hysterical analyses by plaintiff and the majority opinion below to the contrary notwithstanding.

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[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Plaintiff has suggested the existence of a constitutional distinction among the various ways that the *Miranda* doctrine can be "violated." Without support, plaintiff suggests that ignoring the request for counsel is a constitutional violation, while ignoring a request for silence or not even providing the warnings is not constitutional in character. Plaintiff has not shared with any of the courts hearing this case the suggested legal basis of this distinction; no social objective has been identified by him as being promoted by the same distinction. This baseless incantation is used by plaintiff to ask the court to reject the opinions and reasoning in every case in American jurisprudence to have ruled on the issue of whether the *Miranda* requirements are constitutionally mandated. (See Appendix B for a list of these cases.)

Moreover, plaintiff simply ignores cases dealing with a refusal to honor a request for counsel. *Warren v. City of Lincoln*, supra, is only the most recent of these. As stated in *Buckley v. Fitzsimmons*, 919 F.2d 1230, 1244 (7th Cir. 1990), cited by plaintiff:

> "Liability is appropriate, . . . , only when the constitutional violation is complete, and causes injury, out of court. A prosecutor could be liable for depriving a suspect of food and sleep during an interrogation, or beating him with a rubber truncheon, or putting bamboo shoots under his fingernails. A prosecutor could not be mulcted for conducting an interrogation without *Miranda* warnings, because a suspect has no entitlement to the warnings themselves. *Miranda* warnings protect the right to counsel and have no independent stature. Interrogations without *Miranda* warnings thus do not violate a suspects's rights;

> the violation occurs only when the statements are used in criminal proceedings. *Baxter v. Palmigiano*, 425 U.S. 308, 316-18, 96 S.Ct. 1551, 47 L.Ed. 2d 810 (1976); cf. *Oregon v. Elstad*, 470 U.S. 433, 445-46, 94 S.Ct. 2357, 41 L.Ed. 2d 182 (1974); *Michigan v. Tucker*, 417 U.S. 433, 445-46, 94 S.Ct. 2357, 41 L.Ed. 2d 182 (1974). There is likewise no violation in "compelling" a suspect to speak, where the compulsion does not involve practices forbidden on other grounds. The right not to be compelled to testify against oneself is an evidentiary privilege. As the use immunity cases show, the government may require a suspect to speak, so long as it does not use the results against him. *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed. 2d 2212 (1972). Arguments based on *Miranda* and the self-incrimination clause concern the conduct of the trial and therefore may not be the basis of damages; coercive tactics that are independently wrongful may, however, lead to awards." 919 F.2d at p. 1244.

A self-incrimination does not occur without criminal trial use of the statements. *Triplett v. Azordegan*, 570 F.2d 819, 822 (8th Cir. 1978). To the same effect is this court's decision in *Kastigar v. United States*, supra, *United States v. Verdugo-Urquides*, supra at p. 264, and virtually all of the cases approving use immunity as a sufficient means of satisfying self-incrimination concerns. (Plaintiff has cited situations where witnesses and employees were sanctioned by state officials for the act of invoking the self-incrimination privilege. No suggestion exists of any such issue in this case.)

2. Substantive Due Process

Plaintiff has failed to address a single interrogation tactic used by any of these officers which violates the substantive component of the due process clause. Neither a decision to question despite a request for counsel nor any other aspect of plaintiff's interrogation has ever been adjudicated by any court to violate the constitution. Every aspect of plaintiff's interrogation has been briefed. The methods used to interrogate him were legal. The pretense that plaintiff was actually coerced into speaking to these officers is not justified by any credible or substantial evidence. Plaintiff's testimony in his own deposition in this case leaves no room for doubt about that fact. It disposes of the issue, at least by any conventional use of the term "coercion."

CONCLUSION

This case presents a scholarly issue about the nature and scope of both the *Miranda* doctrine and the self-incrimination privilege. The officers proceeded as they did, and their testimony candidly reports their activity. The state of the law at the time of the conduct clearly states that the requirements of *Miranda* are relevant only to admissibility and are not constitutional in character. Absent criminal trial use, no self-incrimination violation occurs.

The officers were engaged in serious business, and their purpose was, more than any other purpose, to get at the truth of whether Cooper was indeed the serial rapist. This they did, although not in ways they originally

expected. The result of the interrogation created serious doubts as to Cooper's guilt, even in the face of normally reliable fingerprint evidence. The same doubts led to a reexamination of the fingerprints, and Cooper was released from custody less than twenty-four hours after his arrest. While undoubtedly the entire experience was extremely distressing to Mr. Cooper, he filed his original complaint in this case without even a single reference to a contention that this interrogation was improper.

The characterizations given by plaintiff's attorneys to these events have been hysterical and accusatory. The majority opinion in the Ninth Circuit adds to these qualities by a peevish sense that somehow these officers are disobedient to the rulings of this and other courts, even to the point of scolding the Tucson Police Department because it was the investigating agency in the case leading to *Mincey v. Arizona*, 437 U.S. 385 (1978), despite the absence of the slightest objective relevance. One gets the sense that the proceedings have taken on the qualities of exaggeration, malice and half-truth.

No law makes *Miranda* or any of its components a rule of constitutional law. No law supports a claim of violation of the self-incrimination privilege where no criminal trial use has been made of the statements. No law forbids the interrogation methods used in questioning Cooper.

The opinion in the Ninth Circuit conflicts with decisions of this court. It conflicts as well with opinions of other federal courts of appeal. The "benignness test" invented by the majority opinion is an invitation to dispute over the character of an interrogator's intentions

rather than his conduct. "Seeking impeachment evidence" is apparently legal, but "keeping him off the witness stand is not." Quarrelsome semantic presentations of such claims to the courts will be virtually without limit, and why not: the majority opinion clearly supports such claims. The petition should be granted.

DATED: October 20, 1992.

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EXHIBIT A

SEGMENT OF INTERROGATION

Segment of initial interrogation of Cooper at the Pima County Sheriff's Department, May 7, 1986, shortly after this interrogation commenced:

KW = Karen Wright

MC = Michael Cooper

KW When you were over at the probation office, Deputy Barkman talked to you, read you your rights and what not, did you have any problems with that, did you understand those rights?

MC Yeah, I understand what is going on, I'm being charged for these, these charges.

KW Do you have any problem right now sitting here talking to me?

MC Yeah, I have a big problem because I didn't do these things.

KW Other than, other than, ___, do you feel comfortable sitting here talking to me now what this is all about.

MC Yes.

KW You have no qualms about talking to me?

MC I have no qualms about talking to you about what, what, ___.

EXHIBIT B

LIST OF CASES ESTABLISHING THE NATURE OF THE DOCTRINE OF *MIRANDA v. ARIZONA*

Connecticut v. Barrett, 479 U.S. 523, 528 (1987)

Maran v. Burbine, 475 U.S. 412, 424 (1986)

New York v. Quarles, 467 U.S. 649, 686 (1984)(dissent)

Michigan v. Tucker, 417 U.S. 433, 444 (1974)

Solem v. Stumes, 465 U.S. 638, 644 (1984)

Hensley v. Carey, 818 F.2d 646, 650 (7th Cir. 1987)

Duncan v. Nelson, 466 F.2d 939 (7th Cir. 1972)

United States v. DeSantis, 870 F.2d 536 (9th Cir. 1988)

Smith v. Edell, 860 F.2d 1528, 1532 (9th Cir. 1988)

Bennett v. Passic, 545 F.2d 1260, 1263 (10th Cir. 1976)

Triplett v. Azordegan, 570 F.2d 819, 822 (8th Cir. 1978)

Hampton v. Gilmore, 60 FRD 71, 81 (D.Mo. 1973)

Ambrek v. Clark, 287 F.Supp. 208, 210 (D.Pa 1968)

Williams v. Tansey, 610 F.Supp. 1083, 1085 (D.Pa. 1985)

Turner v. Lynch, 534 F.Supp. 686, 689 (D.NY 1982)

Chrisco v. Shafron, 507 F.Supp. 1312, 1317 (D.Del. 1981)

Ransom v. City of Philadelphia, 311 F.Supp. 973 (D.Pa. 1970)

Jackson v. Dillon, 518 F.Supp. 618, 621 (D.NY. 1981)

EXHIBIT C

EXCERPT OF MICHAEL COOPER'S DEPOSITION IN THIS CASE

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* * *

(p. 117) you're a sick person and you're the prime time rapist, when you admit that to yourself, you're going to be better off. Mr. Weaver said the same exact words later in his interrogation.

Q. When you we're talking to Karen Wright, did you make any response to her suggestion that you were the prime time rapist?

A. Yeah, I denied it.

Q. Did you deny it throughout the time that she was talking with you?

A. I denied it from the first inference that it could have even been me at the probation office, and I asked to speak to an attorney there. I told them, I'll cooperate with you, but I want to talk to an attorney.

Q. Did you provide the police, either Karen Wright or Weaver Barkman or anyone with information which you thought might be exculpatory, in other words, you thought it might help convince them that you would be not the person that they were after?

A. Yes, sir.

Q. How many different times did you tell them things like this?

A. I couldn't count. I offered them everything, and they said they had everything, they had my car, which amazed me –

(p. 118) MR. WEISS: Just answer the question.

A. I offered them everything, body hairs, anything they wanted.

Q. Because you wanted them to know that you were not the one, didn't you?

A. Yes, sir.

Q. When you got divorced in 1974, was it an aggravating circumstance between the two of you, did you just part the ways and just not talk to each other much?

A. No, sir.

Q. Was it vituperative?

A. I recall sitting down with my wife and sharing with her my feelings about myself and where we were going and how I felt about me and how I felt about her and what was the future as I saw it. And I suggested that maybe we separate for some time so I could deal and sort things out about myself. If that's what it took, maybe that's what it took. And she went and moved in with a girlfriend with the boys, a girlfriend had a house, a big house, who was also divorced, in the same community. I remained at the apartment and continued managing the apartment complex, and we saw each other several times a week. In fact, we were intimate several weeks after our separation, and that went on for almost a year, until I moved out of the

* * *